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DIVISION II

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STATE OF WASHINGTON

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NO. 49050-1-II

STATE OF WASHINGTON COURT OF APPEALS FOR DIVISION II

JOHN WORTHINGTON,

Appellant

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD, ET AL,

Respondents

APPELLANT'S RESPONSE AND REPLY BRIEF

ORAL ARGUMENT REQUESTED

John Worthington
4500 SE 2ND PL.
Renton WA.98059

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1-4
II.	COUNTERSTATEMENT OF THE ISSUES.....	5-6
III.	ARGUMENT.....	7-26
A.	WSLCB admitted Worthington cited specific rules to be repealed on the agency record.....	7
B.	Worthington provided evidence WSLCB was not compliant with RCW 34.05.375.....	7
C.	WSLCB’s process of reason was incomplete.....	7-10
D.	WSLCB acknowledged the rulemaking file was an agency action at issue.....	10-11
E.	WSLCB failed to show any deadlines or waivers in RCW 34.05.566.....	11
F.	The WSLCB rulemaking file argument is a red herring.....	11-12
G.	A remand to the agency was proper.....	12-14
H.	WSLCB uses new and inapplicable case law for arguments never cited during the petition to the agency or in the petition for judicial review, regarding “substantial compliance.”.....	14-16
I.	WSLCB should not be allowed to bring up new arguments regarding their compliance with RCW 34.05.375.....	16-17
J.	WSLCB conceded Worthington’s rules review and standing arguments.....	17-19
K.	WSLCB cannot decide compliance with RCW 34.05.375 under RCW 34.05.570 (4), because the statute provides no relief for rules not developed with substantial compliance with procedures. WSLCB waived any response argument.....	19-20
L.	The COA should remand for a thoughtful response or for new rulemaking.....	20-22
M.	WSLCB concedes Worthington’s APA, UDJA claims.....	22-24
N.	WSLCB has acted unethically.....	24-26
IV.	CONCLUSION.....	26

TABLE OF AUTHORITIES

State Cases.

Alverado v Washington Public Power Supply System (WPPS), 111 Wn.2d 424, 759 P.2d 427, cert. den 109 S.Ct. 1637, 490 U.S. 1004, 104 L. Ed. 2d 153 (1988).....	15
Amalgamated Transit Union Local 587 v. State 142 Wn.2d 183, 203-04 n.4, 11 P.3d 762, 27 P.3d 608 (2000).....	17
Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Board, 89 Wn.2d 688, 575 P.2d 221 (1978).....	14
Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).....	8, 12, 19
Baker v. Teachers Ins. & Annuities Ass Coll. Ret. Equity Funds, 91 Wn.2d 482, 484, 588 P.2d 1164 (1979).....	17
Bolt v. Hurn, 40 Wn. App. 54, 696 P.2d 1261, review denied, 104 Wn.2d 1012 (1985).....	17, 18, 19, 24
City of Seattle v. Public Emp't Relations Commission 116 Wn.2d 923, 809 P.2d 1377 (1991).....	15
Demelash v. Ross Stores. Inc. 105 Wn.App. 508, 527, 20 P.3d 447 (2001).....	16
Neah Bay Chamber of Commerce v. Department of Fisheries, 119 Wn.2d 464, 474, 832 P.2d 1310 (1992).....	13, 15
In RE Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).....	20, 24
Perry v Moran, 111 Wn.2d 885, 766 P.2d 1096, cert. den. 109 S.Ct. 3222, 492 US 911, 106 L.Ed.2d 577 (1989).....	16
Rios v. Dep't of Labor & Indus., 145 Wn.2d 483, 502 n. 12, 39 P.3d 961 (2002).....	23
Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).....	15
Squaxin Island Tribe v. Washington State Dept. of Ecology, 177 Wash. App. 734, 312 P.3d (2013).....	8
State v. Hescok, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999).....	11
State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).....	8, 12, 19
State v. Stubbs 144 Wn. App. 644, 652, 184 P.3d 660 (2008).....	18, 19, 24

California Cases.

Sehulster Tunnels v. Traylor Brothers, et al, 111 Cal. App. 4 th 1328, 1345 fn. 16 (2003).....	18, 19, 24
--	------------

Statutes.

(Former) RCW 34.04.025 (2).....	15
RCW 34.05.310.....	23
RCW 34.05.325.....	23
RCW 34.05.370 (2) (h).....	16
RCW 34.05.375...In Passim	
RCW 34.05.566.....	11
RCW 34.05.570 (2).....	13, 17, 19
RCW 34.05.570 2 (b) (i).....	23
RCW 34.05.570 (4).....	13, 19
RCW 34.05.574 (1).....	21
RCW 40.16.....	26
RCW 42.17A.635.....	26

Court Rules

CR 8 (d).....	9
---------------	---

RAP.

2.5.....	15, 17
----------	--------

Other Authorities

Office of Code Reviser 1988 session law.....	15
--	----

<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1988c288.pdf?cite=1988%20c%20288%20%C2%A7%20314>

I. INTRODUCTION

Worthington respectfully presents his response and reply to WSLCB'S opening and response brief. In response to the opening brief, Worthington argues that the trial court judge's decision to remand back to the agency was proper, because the agency action was arbitrary and capricious and taken without regard to the attending facts. Second, there is no supporting case law or statutory requirement for a party challenging an agency action or the validity of a rule to timely object to the lack of an agency record. There is also no trial court ruling on this issue to appeal.

WSLCB fails to show that the record did not support the trial court's remand to the agency. WSLCB's claim Worthington only sought to challenge the process was simply not supported by the record.

In judicial review, WSLCB attempted to confine Worthington's petition to the agency to the cover sheet of the petition for adoption amendment and repeal, and tried to ignore the elements of the supplemental documents Worthington provided. The trial court was wise to the substance of the supplemental documents in the petition and properly accounted for them in its ruling. After the trial court examined Worthington's oral citations to the agency record the trial court made the proper decision to remand back to the agency.

WSLCB failed to give proper regard to the issues Worthington brought in his petition in both the petition to the agency and the judicial

review. Chiefly, RCW 34.05.375, which contained the rulemaking file statute and made the rulemaking file an agency action at issue. **AR 58-AR 69 and AR 13-91.**

The record clearly shows Worthington claiming the rules were invalidated because he was told by WSLCB that the original rulemaking file for the rules adopted in October of 2013 no longer existed. **AR 65**

That evidence was provided for the record in Worthington's petition to the agency, but the WSLCB simply ignored that specific issue in its agency action and tried to sneak it by the trial court in the petition for judicial review, after accounting for it in its answer to the Amended complaint. The same holds true for Worthington's allegations that the comments from 17 secret meetings with law enforcement, treatment professionals and government entities were not placed in the rulemaking file and also invalidated the rules. **AR 13-91. AR 70-91 AR 130-204**

The record also shows that WSLCB for the most part ignored the specific rulemaking file issue and now claims its process of reasoning was proper despite never addressing Worthington's concerns about the rulemaking file, pre-notice inquiry or other statutes in RCW 34.05.375, other than making general compliance statements.

There is simply no statutory language that supports making agency rules from a rulemaking file, then allowing the agency to pare down that file after the rules are adopted. Here, WSLCB admits to doing this twice.

Once to create a “final copy”, and again to permanently alter the rulemaking file create a temporary agency record in a previous APA challenge.¹ Worthington was not allowed to view the original rulemaking file for the rules WSLCB adopted in October of 2013.

WSLCB tries to have it both ways. On the one hand they claim Worthington did not make the rulemaking file an agency action at issue and therefore was not required to put it in the agency record, while on the other they claim to have made a well-reasoned response to Worthington’s petition to the agency, which included issues about the rulemaking file.

WSLCB also cobbled together a brand new argument supported by new case law arguments, created 10 years prior to the creation of RCW 34.05.375. Those arguments claim substantial compliance with procedures are met even when faulty. This issue was not briefed at the trial court and should not be considered for the first time on appeal. The trial court ruling to remand to the agency should be affirmed.

The WSLCB response brief lacks direct responses to whether the rules review statute was cited in the petition for judicial review and Worthington’s assignments of error for the UDJA issues regarding specific challenges to the trial court’s finding of facts and conclusions of law. Rather than take up legal arguments for the WSLCB the COA should

1. ¹ Bob Schroeter, Karen McCall admits the rulemaking file is now down to 6,000 pages without approval from the board. **CP 210-229, CP 237-240, CP 405-455.**

now treat those uncontested issues as verities on appeal.

Worthington is not trying to apply the UDJA to the rulemaking process, he is trying to apply it to outside interferences from superior entities, cross agency collaborations, a federal grant and a partnership. As it had done in the trial court, WSLCB fails to address these specific allegations and does not contest the evidence. WSLCB claims the “partnership” is a conspiracy, yet fails to explain the evidence neither in the agency record, **AR 43-AR 46** nor in the petition for judicial review. **CP 78, CP 126-143, CP 330.**

This appeal is not a new trial and Worthington’s unaddressed issues regarding his APA claims and the UDJA claims are now verities on appeal, Worthington should prevail on all issues he raised and which were not specifically addressed by WSLCB. The APA issues in the case should be remanded back to the agency so the agency can address Worthington’s petition using the standard set forth in *Squaxin Island Tribe v. Washington State Dept. of Ecology*, 177 Wash. App. 734, 312 P.3d (2013). Or in the alternative, this court should find the remand for that purpose would be futile , and rule the rules for I-502 are invalid for violating RCW 34.05.375, and remand for new rulemaking, not for more dancing around the issues of compliance with RCW 34.05.375.

Worthington alleges WSLCB has acted unethically in this case and should be held accountable under the state laws and court rules.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether Worthington cited specific rules to be repealed in his petition to the agency. Worthington respectfully argues the answer to that is yes. **AR 4, AR 7, AR 59-60**
2. Whether Worthington provided evidence of violations of 34.05.375 Worthington respectfully argues the answer to that is yes. **AR 65, AR 13-91**
3. Whether WSLCB engaged in a process of reason and gave a well-reasoned response. Worthington respectfully argues the answer to that is no.
4. Whether Worthington made the rulemaking file an agency action at issue. Worthington respectfully argues the answer to that is yes. **AR 61, AR 65**
5. Whether the agency record statute, RCW 34.05.566 contains any waivers or deadlines for a party to object to the agency record. Worthington argues the answer to that is no, because the petition for judicial review determines the agency actions at issue.
6. Whether Worthington's motion to supplement the record is a red herring because he could not have supplemented the record with the original rulemaking file. Worthington argues the answer to that is yes, because WSLCB admitted the original rulemaking file for the original rules adopted in October of 2013 no longer existed. **AR 65** and because WSLCB admitted they only have the 6,000 pages from a previous APA agency record. **CP 212, CP 216, CP 247, CP 279**, and because Worthington attempted to negotiate the contents of rulemaking file **AR 236**. Whether Worthington waived the rulemaking file issue after he contacted WSLCB regarding the rulemaking file prior to filing the petition for judicial review. Worthington argues the answer to that is no, because he began negotiations for a paired down rulemaking file based on his indigence, but the board never replied and engaged in the process required by RCW 34.05.566. **AR 236**.
7. Whether remand is proper. Worthington argues the answer to that is yes.

8. Whether WSLCB uses new and inapplicable case law for arguments never cited during the petition to the agency or in the petition for judicial review, regarding “substantial compliance.” Worthington argues the answer to that is no.
9. Whether WSLCB should be allowed to raise new arguments on appeal, regarding the supplemental arguments in Worthington’s petition to the agency, after only addressing the appearance of fairness doctrine issues on the cover page of the original petition. Worthington argues the answer to that is no, because it would do violence to RAP 2.5
10. Whether WSLCB conceded the rulemaking file issue and RCW 34.05.375 by not answering whether the rules adopted in October of 2013 were invalid because the agency no longer had the original rulemaking file as shown to them on **AR 65**. Worthington argues the answer to that is yes, because WSLCB never consulted the rulemaking file to see if it complied with RCW 34.05.375.
11. Whether WSLCB waived arguments that a rules review under RCW 34.05.570 (2) was requested for violations of RCW 34.05.375, and whether it be conducted under RCW 34.05.570 (4). Worthington argues the answer to that is yes.
12. Whether WSLCB conceded Worthington had standing under RCW 34.05.570 (2) when it failed to address the standing requirements in the statute because it could not see Worthington’s rules validity challenge, after the agency acknowledged RCW 34.05.375 and stated it complied with that statute. Worthington argues the answer to that is yes.
13. Whether the COA should remand for a thoughtful response or for new rulemaking.
14. Whether WSLCB conceded all UDJA arguments Worthington argues the answer to that is yes, because case law determines that issues given passing treatment are not to be considered by the court on appeal and are conceded.
15. Whether the WSLCB acted unethically.

III. ARGUMENT

A. WSLCB admitted Worthington cited specific rules to be repealed on the agency record.

In an email response to Worthington Karen McCall stated that Worthington had “spelled out 11 rules” to be repealed. **AR 4**. WSLCB also admitted Worthington sought specific rules to be repealed in its answer to Worthington’s petition for judicial review **CP 678, CP 694**.

B. Worthington provided evidence WSLCB was not compliant with RCW 34.05.375.

Worthington provided an email from its employee stating that WSLCB no longer had the original rulemaking file for the rules they adopted in October of 2013. **AR 65**. Later, in the judicial review, Worthington provided evidence that WSLCB permanently altered the rulemaking file for a temporary agency record in another APA suit. **CP 212, CP 216, CP 247, CP 279**.

Worthington alleged that all rules, 11 rules and then 55 rules should be invalidated. WSLCB did not address how the rules they adopted for October of 2013 could still be valid until their response brief to this court.

C. WSLCB’s process of reason was incomplete.

WSLCB’s process of reason was incomplete, because they erroneously ruled Worthington did not seek to repeal any specific rule and because they gave no answers to the allegations the rules adopted in October of 2013 were invalid because the agency no longer had the

original rulemaking file for those rules, or the allegations they failed to place the comments on I-502 rules in 17 secret meetings.

WSLCB attempts to show that it applied a thorough process of reason to Worthington's petition to the agency, but that process of reason was short circuited by the agency claims that Worthington failed to cite any particular rule, and by the lack of reasoning to the accusation that the rules were invalidated because the original rulemaking file no longer existed and the equaled lack of reasoning on whether the I-502 related comments in the 17 secret public meetings should have been placed in the rulemaking file. Where a party "fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995), *also* *Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).

WSLCB properly cites *Squaxin Island Tribe v. Washington State Dept. of Ecology*, 177 Wash. App. 734, 312 P.3d (2013), as the standard for examining whether an agency's process of reason is adequate, but fails to show the WSLCB agency action in this case mirrors that of the Washington State Department of Ecology in *Squaxin*.

Whereas the Department of Ecology acknowledged the tribe's issues and gave a "well-reasoned", and "thoughtful response" to each issue, WSLCB decided to confine its process of reason to the original petition to the agency and was based on the error in fact that Worthington

did not “cite a particular rule”, while it gave general denials to the specific allegations of violations of RCW 34.05.375 in the supplemental documents to the petition to the agency shown in **AR 58-AR 69**, and **AR 13-91**.

Here, WSLCB never addressed the issues brought forth by Worthington on **AR 58-AR 69**, or **AR 13-91**², even though they erroneously claimed to consider all the information Worthington provided. **CP 747**. The WSLCB has never addressed the evidence Worthington provided to the board in the form of an email from Bob Schroeter stating the original rulemaking file for the rules adopted in October of 2013 **AR 65** and the meeting minute notes containing the I-502 rule comments from law enforcement, treatment professionals and government entities. **AR 13-91**.

WSLCB also attempts to deny the existence of specific rule challenges and rulemaking file issues while at the same time it acknowledging them in their agency ruling and in its answer to the petition for judicial review. **CP 694, CP 695, CP 696, CP 698**. WSLCB wants to escape the well-reasoned and thoughtful requirement and avoid the provisions of CR 8 (d) at the same time.

In other words, WSLCB cannot show a “well-reasoned”, and

² WSLCB has continuously and erroneously maintained that Worthington made “bare assertions”, but the agency record shows an email from Bob Schroeter and meeting minute notes of comments on I-502 rules (**AR 58-AR 69**, or **AR 13-91**) Worthington alleged should have been part of the rulemaking file.

“thoughtful response” to the specific rules challenge, and the rulemaking file issue, because they either claimed not to see issues or failed to address them with specifics, while at the same time documenting them both on the agency record in its ruling and in their answering brief. For that reason their process of reason is incomplete.

D. WSLCB acknowledged the rulemaking file was an agency action at issue.

In its decision, WSLCB acknowledge that a procedural challenge to the rules was made to the Board pursuant to RCW 34.05.375. **AR 2-3, AR 56.** That procedural challenge contained the rulemaking file statute and was cited in the petition to the agency. When the Board cited RCW 34.05.375 in its decision on the petition to the agency, the rulemaking file became an agency action at issue.

The rulemaking file issue was raised in the petition for judicial review and that established the rulemaking file was an agency action at issue that should have been part of the agency record on judicial review. The rulemaking file issues can be seen on (**AR 58-AR 69, or AR 13-91**) **CP 564,CP 569, CP 571, CP 572, CP 577, CP 578, CP 579.**

Once the petition for judicial review made the rulemaking file an agency action, it was statutorily required for the board to provide the rulemaking file for a judicial review. There are no statutory provisions for failing to contest an agency record. Worthington actually communicated with WSLCB on the rulemaking file but they never

undertook the negotiations required by the statute. **AR 236.** WSLCB decided on its own to withhold documents regarding the agency action at issue and violated the statutes when it did so.

E. WSLCB failed to show any deadlines or waivers in RCW 34.05.566.

There are no statutory laws under the APA that show any deadlines for contesting an agency record. That issue is settled by statute in RCW 34.05.566. The trial court made no written ruling on the issue. “Oral decisions are not reviewable unless they are incorporated into the final written orders.” *State v. Hescok*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999). WSLCB managed to frustrate a proper judicial review of RCW 34.05.375, by withholding the rulemaking file from the judicial review after it was obviously made an agency action at issue in the petition to the agency and in the petition for judicial review. WSLCB only responded to these allegations and made their own counter arguments in the oral argument. However, judicial consideration cannot be given to arguments not briefed and not incorporated into a written ruling.

F. The WSLCB rulemaking file argument is a red herring.

The WSLCB rulemaking file argument is a red herring, because even if there were statutory and case law for WSLCB to cite, any rulemaking file Worthington had was not the original rulemaking file that would be applicable to a rules review challenge for rules adopted in

October of 2013. Worthington actually communicated with the board on the rulemaking file but the Board never undertook the negotiations required by the statute. **AR 236**

G. A remand to the agency was proper.

It was an easy call for the trial court to remand back to the agency and the COA should affirm the trial court. Even the WSLCB requested a remand in the alternative. **AR 756.**

WSLCB tried to confine Worthington's petition to the agency to the cover sheet of the petition and fails to respond in detail to the supplemental documents it has acknowledged in emails, its answer and subsequent briefings. The board never addressed the issues brought forth by Worthington on **AR 58-AR 69**, or **AR 13-91**³, even though they erroneously claimed to consider all the information Worthington provided. **CP 747.** Where a party "fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *State v. Olson*, 126 Wn.2d 315. 321, 893 P.2d 629 (1995), *also Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).

The trial court was correct to remand back to the agency because there were specific rules cited and because the agency never thoroughly explained Worthington's issues brought up in **AR 58-AR 69**, or **AR 13-9**.

³ WSLCB has continuously and erroneously maintained that Worthington made "bare assertions", but the agency record shows an email from Bob Scroeter and meeting minute notes of comments on I-502 rules (**AR 58-AR 69**, or **AR 13-91**) Worthington alleged should have been part of the rulemaking file.

Perhaps the trial court included the rule review issue when requiring a more thoughtful response. Regardless, any rules review for compliance with RCW 34.05.375 would have to be under RCW 34.05.570 (2), not RCW 34.05.570 (4). WSLCB avoids that specific argument, perhaps because they cannot show any available relief for violations of RCW 34.05.375 under RCW 34.05.570 (4).

The Washington State Supreme Court has held:

“the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision **was based on a consideration of the relevant factors.**”

Neah Bay Chamber of Commerce v. Department of Fisheries, 119 Wn.2d 464, 474, 832 P.2d 1310 (1992). (Citation omitted.)

Here, WSLCB did not show its process of reason examined the email from Bob Schroeter or the meeting minutes from the 17 secret meetings containing the I-502 rule comments from law enforcement, treatment professionals and government entities. **AR 65 AR 13-91.**

The Supreme Court also held:

[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given.

However, that is what is required in this case because the agency based its decision on the recommendation of staff. Staff appeared to rely on the error in fact that Worthington cited no specific rules to be repealed and

only challenged the process. Then staff made a general statement that the Board complied with RCW 34.05.375. This general statement does not expose the path staff took to arrive at that decision and does not come close to the requirement that they make “a rational connection between the facts found and the choice made.” Without that path clearly discernable, this court cannot uphold the agency decision to deny Worthington’s petition to the agency.

We will, however, uphold a decision of less than ideal clarity **if the agency’s path may reasonably be discerned.**

Neah Bay Chamber of Commerce v. Department of Fisheries, 119 Wn.2d 464, 474, 832 P.2d 1310 (1992). (Citation omitted.)

H. WSLCB uses new and inapplicable case law for arguments never cited during the petition to the agency or in the petition for judicial review, regarding “substantial compliance.”

WSLCB cobbles together an outdated and inapplicable legal beer cap puzzle of cases, that attempts to negate and redefine the statutory requirements of RCW 34.05.375 and render the rulemaking file subsections useless.

WSLCB starts with Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Board, 89 Wn.2d 688, 575 P.2d 221 (1978), and prefaces the citation with RCW 34.05.375 as if the statute is relevant to the case. However, that case was decided 10 years prior to the

creation of the statute itself,⁴ and was based on a former version of the APA specifically RCW 34.04.025 (2). However, that statute was repealed effective 1989.⁵ *City of Seattle v. Public Emp't Relations Commission* 116 Wn.2d 923, 809 P.2d 1377 (1991), was a case that also decided the application of the former Administrative Procedure Act, prior to its 1988 amendments. *Neah Bay Chamber of Commerce v. Department of Fisheries*, 119 Wn.2d 464, 474, 832 P.2d 1310 (1992), has no relevance to the application of RCW 34.05.375. Furthermore, this argument has only been presented on appeal and does violence to RAP 2.5. "One of the fundamental principles of appellate practice is that a party cannot make new arguments on appeal as the trial court was never given the opportunity to consider the appellant's argument." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); *Alverado v Washington Public Power Supply System (WPPS)*, 111 Wn.2d 424, 759 P.2d 427, cert. den 109 S.Ct. 1637, 490 U.S. 1004, 104 L.Ed. 2d 153 (1988).

⁴<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1988c288.pdf?cite=1988%20c%20288%20%A7%20314>. **NEW SECTION.** Sec. 314. SUBSTANTIAL COMPLIANCE WITH : PROCEDURES. No rule proposed after the effective date of this section, is valid unless it is adopted in substantial compliance with sections 301 through 318 of this act. Inadvertent failure to mail notice of a proposed rule adoption to any person as required by section 303(3) of this act does not Invalidate A rule. No action based upon this section may be maintained to contest the validity of any rule unless it is commenced within two years after the effective date of the rule.

⁵ 34.04.025 Notices of intention to adopt rules — Opportunity to submit data — Proceedings on rule barred until twenty days after register distribution — Noncompliance, effect.[1982 c 221 § 1; 1981 c 324 § 3; 1977 ex.s. c 240 § 7; 1971 ex.s. c 250 § 17; 1967 c 237 § 3.] **Repealed** by 1988 c 288 § 701, effective July 1, 1989. <http://app.leg.wa.gov/RCW/disp0.aspx?cite=34.04.055>

Demelash v. Ross Stores. Inc, 105 Wn. App .. 508. 527, 20 P.3d 447 (2001) ("We generally will not review an issue, theory or argument not presented at the trial court level. The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials:' [Footnotes omitted.])

Whether WSLCB is exempt from placing documents in the rulemaking file, is moot once they are placed there, because the statute says they must remain. RCW 34.05.370 (2) (h). Furthermore, that does not explain why you would permanently alter the file for a temporary agency record. WSLCB is hoping this court will uphold a new standard the APA was intended to prevent. That standard would be to assemble a "working" copy for an agency to make rules from, and then strip out stuff that was used to make rules so the public never sees the real file they used. In this case the omitted and removed documents were not recovered in time to rebut or comments on until after the rules for October of 2013 were adopted, despite WSLCB claims to the contrary.

WSLCB claims Worthington had opportunity to respond to its hidden documents is not supported by the record. Arthur West's court case ruling of the 17 secret public meetings was not made available to the public until just after October 31st of 2014. **AR 92-AR 107**, one year after the rules Worthington are challenging were adopted.

I. WSLCB should not be allowed to bring up new arguments regarding their compliance with RCW 34.05.375.

WSLCB waited until its response brief in this appeal to make any specific arguments about compliance with RCW 34.05.375. The time for making these arguments was in the petition to the agency and in the judicial review, not for the first time on appeal. WSLCB continues its assault on RAP 2.5.

J. WSLCB conceded Worthington's rules review and standing arguments.

In seeing only the appearance of fairness doctrine claims, and confining its response to the cover sheet and original petition, the rules review under RCW 34.05.570 (2) and the standing requirements for the supplemental claims was waived by the board. New standing challenges are not allowed on appeal. "Outside the Declaratory Judgments Act, standing is an issue that must be raised in the trial court." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203-04 n.4, 11 P.3d 762, 27 P.3d 608 (2000); see also *Baker v. Teachers Ins. & Annuities Ass Coll. Ret. Equity Funds*, 91 Wn.2d 482, 484, 588 P.2d 1164 (1979) (where issue of standing was not submitted to trial court, it could not be considered on appeal). WSLCB never replied to the allegation the rules review statute was in the petition for judicial review.

WSLCB conceded these arguments in its response brief. WSLCB waived the issue and now requires the court to take up a position on the Respondent's behalf: but should instead grant the relief requested by the Appellant as to those undisputed issues. (See, *Bolt v. Hurn*, 40 Wn.App.

54,696 P.2d 1261, review denied, 104 Wn.2d 1012 (1985) (granting the relief requested by the Appellant as to a significant issue that the Respondent did not address in its response brief) "Passing treatment of an issue, or a lack of reason argument sufficient for meaningful review, permits the Appellate Court to simply disregard a party's contentions." (See, State v. Stubbs 144 Wn. App. 644,652, 184 P.3d 660 (2008).(failure in response to respond to an argument raised on in opposing party's opening brief amounts to an apparent concession). Courts should not take up a position on the Respondent's behalf, but should instead grant the relief requested by the Appellant as to those undisputed issues. See, Bolt v. Hurn, 40 W. App. 54, 60 (1995) (granting the relief requested by the Appellant as to a significant issue that the Respondent did not address in its response brief); Schulster Tunnels v. Traylor Brothers, et al, 111 Cal. App. 4th 1328, 1345 fn. 16 (2003) (granting relief based on Respondent's failure to dispute a material issue in its response brief.

Worthington is a verified medical marijuana patient that now had to rely on the recreational stores because of the changes to the Washington State medical marijuana law. WSLCB failed to address Worthington's hypothetical standing arguments, which were waived by the agency at the trial court level because the WSLCB did not see any other claims besides the appearance of fairness doctrine claims. The standing issues were not raised at the agency action and there was never a ruling by the trial court

for the appeals court to review. WSLCB wants the COA to commit violence to RAP 2.5 to decide standing issues to claims the WSLCB never saw and addressed at the trial court.

K. WSLCB cannot decide compliance with RCW 34.05.375 under RCW 34.05.570 (4), because the statute provides no relief for rules not developed with substantial compliance with procedures. WSLCB waived any response argument.

Any rules review for compliance with RCW 34.05.375 would have to be under RCW 34.05.570 (2), not RCW 34.05.570 (4). WSLCB avoids that specific argument, perhaps because they cannot show any available relief for violations of RCW 34.05.375 under RCW 34.05.570 (4). WSLCB avoids addressing this argument in its response. Where a party "fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995), *also* *Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637 (2005). WSLCB conceded this argument in its response brief. WSLCB waived the issue and now requires the court to take up a position on the Respondent's behalf: but should instead grant the relief requested by the Appellant as to those undisputed issues. (See, *Bolt v. Hurn*, 40 Wn. App. 54, 696 P.2d 1261, review denied, 104 Wn.2d 1012 (1985) (granting the relief requested by the Appellant as to a significant issue that the Respondent did not address in its response brief) "Passing treatment of an issue, or a lack of reason argument

sufficient for meaningful review, permits the Appellate Court to simply disregard a party's contentions." (See, State v. Stubbs 144 Wn. App. 644,652, 184 P.3d 660 (2008). (Failure in response to respond to an argument raised on in opposing party's opening brief amounts to an apparent concession). Courts should not take up a position on the Respondent's behalf, but should instead grant the relief requested by the Appellant as to those undisputed issues. See, Bolt v. Hurn, 40 W. App. 54, 60 (1995) (granting the relief requested by the Appellant as to a significant issue that the Respondent did not address in its response brief); Schulster Tunnels v. Traylor Brothers, et al, 111 Cal. App. 4th 1328, 1345 fn. 16 (2003) (granting relief based on Respondent's failure to dispute a material issue in its response brief. In re Estate of Lint, 135 Wn.2d 518, 532. 957 P.2d 755 (1998) (it is not the function of an appellate court to construct arguments for counsel).

L. The COA should remand for a thoughtful response or for new rulemaking.

The board never addressed the issues brought forth by Worthington in his petition to the agency⁶, even though they erroneously claimed to consider all the information Worthington provided. **CP 747**. The WSLCB took the same tact in the Petition for judicial review by citing the procedural challenges but WSLCB never did address the

⁶ WSLCB has erroneously maintained that Worthington made bare assertions, but the agency record shows an email from Bob Schroeter and meeting minute notes in the 17 secret meetings of comments on I-502 rules (**AR 13-91**)

evidence Worthington provided to WSLCB in the form of an email from Bob Schroeter stating the original rulemaking file for the rules adopted in October of 2013 no longer existed, **AR 65** and ignored the additional claims the file was now illegally paired down to 6,000 pages. **CP 212, CP 216, CP 247, CP 279**. WSLCB also avoided responding to the issues regarding the meeting minutes notes containing the I-502 rule comments from law enforcement, treatment professionals and government entities, that should have been in the rulemaking file. **AR 13-91**.

The court of appeals should rule in Worthington's favor because the WSLCB avoided contesting these issues despite Worthington having pleaded them in both the petition to the agency and in the petition for judicial review. These issues cannot be addressed for the first time on appeal. Either the court should let Worthington prevail on appeal or the COA should remand the case back to the agency. A second kick at the cat should not come on appeal, but it could be taken on a remand to the agency. Worthington argues that remand for a thoughtful response is futile because the agency has twice stated it no longer has the rulemaking file for the rules it adopted in October of 2013. The Court of Appeals has the discretion under RCW 34.05.574 (1) to invalidate the rules and remand for new rulemaking rather than send the matter back for a more thoughtful answer to Worthington's petition, pursuant to the language : "unless remand is impracticable or would cause unnecessary delay." Remand for

an answer the court already has is impractical and would just cause delay.

M. WSLCB concedes Worthington's APA, UDJA claims.

In the WSLCB reply brief, WSLCB states that Worthington only made appearance of fairness doctrine claims and made no applicable arguments to Worthington's claims regarding the partnership⁷, federal grant, Governor's office and Attorney General's office influence. Other than stating Worthington made bald assertions and provided no evidence, WSLCB remained silent on the crux of Worthington's UDJA arguments. For instance, Worthington argued the Governor's office interfered with the rulemaking by telling the agencies involved with implementing section 28 to keep discussions internal. Worthington also alleged the Attorney General's office hid its rulemaking participation in the attorney client privilege. Worthington also alleged the WSLCB had a conflict of interest because it became part of a federal grant and also entered into a rulemaking partnership. Worthington also alleged cross agency collaborations targeted I-502 rulemaking. The pre notice inquiries filed as exhibits were allowable under the UDJA and speak to the fact that these rulemaking interferences cannot be addressed by the APA because none of the entities were placed in the pre-notice inquiry. Furthermore, they were allowable because a rules validity challenge can be made without filing a

⁷ CP 78 CP 126, CP 127, CP 128, CP 130, CP 131, CP 135, CP 136, CP 137, CP 139 and CP 141.

petition to the agency. RCW 34.05.570 2 (b) (i).⁸ See *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 502 n. 12, 39 P.3d 961 (2002). Not allowing evidence that was not submitted to the agency would frustrate that statute.(issue moot because the trial court never made a ruling.)

Worthington also alleged violations of RCW 34.05.310, and RCW 34.05.325. None of those allegations were addressed by the WSLCB and are now verities on appeal. Worthington also alleged WSLCB set up a “information sharing forum”, “separate process to get info” because “some would not want a public discussion.”⁹ WSLCB shies away from this argument and evidence. Perhaps because it confirms that WSLCB conducted partnership activity outside the APA and would only be addressable under the UDJA.

All of these specific allegations were supported by evidence which WSLCB also ignored and did not dispute specifically. Worthington provided evidence of more than one partnership the WSLCB was entered into. WSLCB did not provide any specific counter evidence that they had informed the agencies and entities that they were not part of a partnership. **AR 46** shows a partnership but the WSLCB ignored the accusation in its agency decision and that practice has continued right up to their response.

WSLCB conceded all those arguments in its response brief and

⁸ (b)(i) *The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.*

⁹ CP 146-147

waived the issues on appeal and now needs the COA to take up a position on the Respondent's behalf: but should instead grant the relief requested by the Appellant as to those undisputed issues. (See, Bolt v. Hurn, 40 Wn. App. 54,696 P.2d 1261, review denied, 104 Wn.2d 1012 (1985) (granting the relief requested by the Appellant as to a significant issue that the Respondent did not address in its response brief) "Passing treatment of an issue, or a lack of reason argument sufficient for meaningful review, permits the Appellate Court to simply disregard a party's contentions." (See, State v. Stubbs 144 Wn. App. 644,652, 184 P.3d 660 (2008).(failure in response to respond to an argument raised on in opposing party's opening brief amounts to an apparent concession). Courts should not take up a position on the Respondent's behalf, but should instead grant the relief requested by the Appellant as to those undisputed issues. See, Bolt v. Hurn, 40 W. App. 54, 60 (1995) (granting the relief requested by the Appellant as to a significant issue that the Respondent did not address in its response brief); Schulster Tunnels v. Traylor Brothers, et al, 111 Cal. App. 4th 1328, 1345 fn. 16 (2003) (granting relief based on Respondent's failure to dispute a material issue in its response brief. Worthington should prevail on all his UDJA claims. (See In re Estate of Lint, 135 Wn.2d 518, 532. 957 P.2d 755 (1998) (it is not the function of an appellate court to construct arguments for counsel). These unaddressed arguments are now verities.

N. WSLCB has acted unethically.

If this court is going to allow arguments for the first time on appeal, Worthington would like this court to consider that he was not given access to the agency record until after his amended petition for judicial review was due and filed. The agency obviously resorted to trickery to keep Worthington from quoting the agency record. This reckless disregard to the process continued with the withholding of the rulemaking file during the judicial review. Now on appeal, WSLCB tries even more shady tactics with the use of a verbatim report for the PRA case to show that evidence was not allowed in this APA case. Not only is this dastardly and unethical it should be cause for sanctions, considering the WSLCB was informed of the gaffe before quoting the wrong hearing in their response brief.

The most unethical violation by WSLCB was hiding the participation of federally funded agencies that were bound by anti-lobbying laws which only allowed these entities to share information. By meeting in a secret forum, WSLCB allowed these entities to do more than just share information, they allowed them to comment on rules. **AR 15-42, AR 125-172**. Once they commented on rules they were required to report that activity to the Public Disclosure Commission, which none of them did because they never thought anybody would find out they were commenting on rules and not just sharing information. To date,

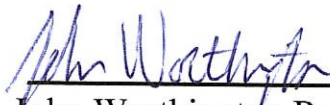
Worthington has found no L-5¹⁰ reporting documents filed by the agencies in Results Washington, State Policy Enhancement, the agencies in the internal or external implementation team, AR 43, or any of the other agencies involved in the 17 secret meetings, for their work on I-502. Essentially, Worthington avers that WSLCB aided and abetted in the violations of laws in the APA, UDJA, RCW 42.17A.635 and RCW 40.16.

IV. CONCLUSION

Based on the forgoing, Worthington respectfully requests a ruling under seal of the COA for Division II, for the relief detailed in Worthington's opening brief.

Respectfully submitted this 23TH day of January, 2017

BY



John Worthington Pro Se /Appellant
4500 SE 2ND PL.
Renton WA.98059

¹⁰ Agency heads are subject to penalties for failing to file complete, accurate and timely L-5 reports.

2017 JAN 26 AM 9:25

Declaration of Service STATE OF WASHINGTON

I declare that on the date and time indicated below, I caused to
be served Via personal service a copy of the documents and
pleadings listed below upon the attorney of record for the
defendants herein listed and indicated below.

1. Appellant's response and reply brief

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE
1250 Pacific Ave, Suite 105
Tacoma WA. 98401

COA DIVISION II
950 Broadway, Suite 300
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the United
States that

the foregoing is True and correct.

Executed on this 25th day of January, 2017.

BY



John Worthington Pro Se /Appellant
4500 SE 2ND PL.
Renton WA.98059

NO. 49050-1-II

STATE OF WASHINGTON COURT OF APPEALS FOR DIVISION II

JOHN WORTHINGTON,

Appellant

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD, ET AL,

Respondents

APPELLANT'S ERRATA BRIEF

John Worthington
4500 SE 2ND PL.
Renton WA.98059

John Worthington respectfully requests this court to take note that the counterstatement of issues in subsection 8 incorrectly states:

Whether WSLCB uses new and inapplicable case law for arguments never cited during the petition to the agency or in the petition for judicial review, regarding "substantial compliance." Worthington argues the answer to that is **no**.

The correct writing of the subsection should be:

Whether WSLCB uses new and inapplicable case law for arguments never cited during the petition to the agency or in the petition for judicial review, regarding "substantial compliance." Worthington argues the answer to that is **yes**.

Respectfully submitted this 10TH day of February, 2017

BY S/JOHN WORTHINGTON

John Worthington Pro Se /Appellant
4500 SE 2ND PL.
Renton WA.98059

Declaration of Service

I declare that on the date and time indicated below, I caused to be served
Via email, a copy of the documents and pleadings listed below upon the attorney of
record for the defendants herein listed and indicated below.

1. APPELLANT'S MOTION TO FILE AN ERRATA

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE
1250 Pacific Ave, Suite 105
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COA DIVISION II
950 Broadway, Suite 300
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the United States that the
foregoing is True and correct.

Executed on this 10th day of February, 2017.

BY S:/ JOHN WORTHINGTON
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